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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR SENATORS EDWARD M. KENNEDY AND RUSSELL D. FEINGOLD AS AMICI CURIAE IN SUPPORT OF PETITIONER

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35 pp

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICI 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

BACKGROUND 3

A. The Statutory and Regulatory Framework. 3

B. The Present Case. 6

ARGUMENT 8

I. STATES HAVE NO SOVEREIGN IMMUNITY AS AGAINST THE UNITED STATES. 8

II. AN AGENCY PROCEEDING IS THE PROCESS BY WHICH THE EXECUTIVE DECIDES HOW IT WILL ENFORCE FEDERAL LAW. 12

III. A STATE DOES NOT HAVE IMMUNITY IN A COMMISSION PROCEEDING AS ANY COMPULSION RESULTS FROM THE ACTION OF THE UNITED STATES. 20

A. Sovereign Immunity Protects a State From Coercion by a Private Party. 21

B. Private Parties and the Commission Do Not Have Independent Coercive Powers and Any Coercion in the Regulatory Scheme Is the Power of the United States. 23

1. Stigmatic Harm 23

2. Enforcement Action by Private Party 24

3. Enforcement Action by the United States 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page(s)

Alden v. Maine, 527 U.S. 706 (1999) ..... *passim*
Bennett v. Spear, 520 U.S. 154 (1997) 16
California v. United States, 320 U.S. 577 (1944) 1, 3, 4, 9, 15
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13, 14, 19, 26
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 1, 22, 24, 26
Coyle v. Smith, 221 U.S. 559 (1911) 2
EEOC v. Wyoming, 460 U.S. 226 (1983) 27, 28
FMC v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975) 27
Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641 (1990) 14
Freytag v. Commissioner, 501 U.S. 868 (1991) 17, 19
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 27, 28
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 1, 9
Hans v. Louisiana, 134 U.S. 1 (1890) 23, 24, 26
Heckler v. Campbell, 461 U.S. 458 (1983) 17
Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) 14
INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 14
In re Ayers, 123 U.S. 443 (1887) 23
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 14
Nevada v. Hall, 440 U.S. 410 (1979) 1, 22, 27, 28
New York v. United States, 505 U.S. 144 (1992) 2, 24, 26
Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990) 15
Petchem, Inc. v. FMC, 853 F.2d 958 (D.C. Cir. 1988) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 10, 11
Printz v. United States, 521 U.S. 898 (1997) 2
Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 9
Reno v. Condon, 528 U.S. 141 (2000) 2, 11, 12, 28
Ristow v. South Carolina Ports Authority, 58 F.3d 1051 (4th Cir. 1995) 7
SEC v. Chenery Corp., 318 U.S. 80 (1943) 16
SEC v. Chenery Corp., 332 U.S. 194 (1947) 13, 14, 15, 16
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 10, 23, 27
South Carolina v. Baker, 485 U.S. 505 (1988) 2, 11
South Carolina State Ports Authority v. FMC, 243 F.3d 165 (4th Cir. 2001) 8, 12, 20, 24
United States v. Locke, 529 U.S. 89 (2000) 9
United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164 (2001) 14
United States v. Mississippi, 380 U.S. 128 (1965) 10
United States v. Morton Salt Co., 338 U.S. 632 (1950) 18
United States v. Texas, 143 U.S. 621 (1892) 11, 27, 28
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 15
West Virginia v. United States, 479 U.S. 305 (1987) 10, 20, 27, 28

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI 9
5 U.S.C. § 553 4
5 U.S.C. §§ 553-558 13
The Hobbs Act, 28 U.S.C. § 2341 *et seq.* 6, 26
28 U.S.C. § 2344 ..... 6, 7

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 2521 19
46 U.S.C. app. § 1702(14) 6
46 U.S.C. app. § 1706 3
46 U.S.C. app. § 1709 3
46 U.S.C. app. § 1709(d) 6
46 U.S.C. app. § 1710(a) 4, 5, 7, 18
46 U.S.C. app. § 1710(c) 4, 18
46 U.S.C. app. § 1710(h) 4
46 U.S.C. app. § 1712(a) 5, 6
46 U.S.C. app. § 1712(e) 6, 27
46 U.S.C. app. § 1713(a) 4
46 U.S.C. app. § 1713(c) 5, 6, 20, 24, 26
46 U.S.C. app. § 1713(d) 5, 6, 20, 24, 26
Reorganization Plan No. 7 of 1961, 75 Stat. 840 3

RULES & REGULATIONS

46 C.F.R. § 502.27 ..... 4, 15
46 C.F.R. §§ 502.51-502.56 ..... 4, 5, 17
46 C.F.R. § 502.56 4
46 C.F.R. § 502.67 ..... 5, 18
46 C.F.R. § 502.142 4
46 C.F.R. § 502.210(b) 5
46 C.F.R. § 502.223 ..... 4, 5, 7, 15
46 C.F.R. § 502.225 ..... 5, 15
46 C.F.R. § 502.226(a) 5, 16
46 C.F.R. § 502.227 ..... 5, 7
46 C.F.R. § 502.227(a)(6) 5, 15, 16, 17
46 C.F.R. § 502.281 4
46 C.F.R. § 502.282 4
Fed. R. Bankr. P. 19

TABLE OF AUTHORITIES—Continued

BOOKS, ARTICLES & TREATISES

Page(s)

1 Davis, Kenneth Culp & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994) 13, 15
3 *Debates on the Federal Constitution* (Jonathan Elliot 2d ed. 1836) 22
Federalist No. 12 (Hamilton) 9, 10
Federalist No. 39 (Madison) 8, 9
Federalist No. 44 (Madison) 9
Federalist No. 64 (Jay) 9
Federalist No. 81 (Hamilton) 21, 22, 23
Pierce, Richard J., Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 Hastings L.J. 1 (1979) 13

AGENCY ORDERS

Motion of Respondent South Carolina State Ports Authority To Dismiss Complaint Granted, in *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, No. 99-21 (FMC Jan. 5, 2000) 7
Order Reversing the Administrative Law Judge's Order and Recommendation for Further Proceedings, in *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, No. 99-21 (FMC Mar. 23, 2000) 7, 25, 26

STATEMENT OF INTEREST OF AMICI

Amici are United States Senators, both of whom serve on the Senate Judiciary Committee. Amici file this brief because the court of appeals' decision in this case, if allowed to stand, could call into question a range of important statutes enacted by the Congress of the United States, including the Shipping Act of 1984. The rule announced by the court of appeals, in addition, could limit the ability of Congress in the future to adopt legislation that vests federal administrative agencies with the authority and flexibility they may need to enforce important federal regulatory programs against state instrumentalities.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

By any standard, one of the central attributes of sovereignty is the "'right to govern.'" *See Nevada v. Hall*, 440 U.S. 410, 416 (1979) (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793)). Although this case involves a state's claim of sovereign immunity, it is equally about the right of the United States to govern. Congress enacted the Shipping Act of 1984, applied that law to state instrumentalities, and directed that the Federal Maritime Commission (the "Commission") enforce the Act. The unprecedented decision of the court of appeals, however, if allowed to stand, would undermine Congress' ability to legislate and the Commission's ability to enforce federal law in an area that implicates Congress' well-settled and plenary authority to regulate interstate and foreign shipping. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *see also California v. United States*, 320 U.S. 577 (1944). It would do so, moreover, even

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[1] No part of this brief was drafted by any of the parties to this action, and no one other than the amici or their counsel have made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

though the federal regulatory process at issue neither threatens the states' separate and distinct status, *see, e.g.*, *Coyle v. Smith*, 221 U.S. 559 (1911), nor seeks to commandeer the states to enact or enforce federal law, *see New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). Rather, as in *Reno v. Condon*, 528 U.S. 141 (2000), and *South Carolina v. Baker*, 485 U.S. 505 (1988), this case does not "seek to control or influence the manner in which States regulate private parties," *Baker*, 485 U.S. at 514-15.

In the court of appeals' view, an administrative proceeding brought before the Commission by a private party is sufficiently analogous to a private lawsuit that a state instrumentality may cloak itself in sovereign immunity and, on that basis, demand dismissal of the regulatory proceeding before the Commission. The approach adopted by the court of appeals fundamentally misconceives the role of the Commission, the function of the administrative proceeding at issue, and the constitutionally prescribed allocation of state and federal power. An administrative proceeding, whether commenced by private complaint or at the agency's own initiative, is not a private lawsuit. Rather, the proceeding is the process by which the Commission determines how *it* should discharge its obligation to enforce federal law.

This Court has recognized that the states retained their immunity against private suit when they joined the Union. It has also recognized, however, that the states surrendered their immunity with respect to actions taken by the national government within the sphere of its limited, but supreme authority. Because this case involves the power of the United States—and its power to enforce its laws—any coercion that may be present in this regulatory scheme is constitutionally permissible. To deny the Commission authority to proceed against the states is to deny the fundamental tenet of federalism that the broad sovereignty of the states ends at the

boundary of the federal government's "right to govern" in areas of federal concern.

BACKGROUND

A. The Statutory and Regulatory Framework.

The Shipping Act regulates an "essential part of interstate and foreign trade." *California*, 320 U.S. at 586. Congress passed the Act to protect the United States against international competition in the shipping industry, and, to further this goal, granted antitrust immunity to domestic shipping carriers and the maritime terminal operators that berth them. *See* 46 U.S.C. app. § 1706. Nonetheless, to prevent abuse of this immunity, the Act prohibits discriminatory practices by the regulated entities. *Id.* § 1709.[2]

The Federal Maritime Commission is the administrative agency empowered to administer and enforce the Shipping Act. The Commission is composed of five members appointed by the President with the advice and consent of the Senate.[3] As this Court described the Commission's prede-

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2 Congress originally passed the Shipping Act in 1916. In *California v. United States*, 320 U.S. 577, 585-86 (1944), this Court interpreted the Act and concluded that its definition of "person[s]" regulated by the Act covers states as well as private entities: "The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers;" the Court concluded that the Act leaves "no doubt that the legislation was designed to prevent discrimination no less by public than by private owners." *Id.* at 586. In 1984, Congress replaced the Act with the Shipping Act of 1984. The definition of "person[s]" covered by the 1984 Act tracks the language of the 1916 Act. In light of this settled history, the Ports Authority does not, and could not, argue that the Shipping Act does not apply to state instrumentalities.

3 The Commissioners are removable by the President for inefficiency, neglect of duty, or malfeasance in office. Reorganization Plan No. 7 of 1961, 75 Stat. 840, 840.

cessor agency, it is "the expert body established . . . for safeguarding this specialized aspect of the national interest." *California*, 320 U.S. at 584.

The Commission has a number of regulatory tools at its disposal to perform its "extensive regulatory duties," 46 C.F.R. § 502.281. In addition to adjudications of the type at issue in the present case, *id.* § 502.142, the Commission may conduct nonadjudicatory investigations when the Commission determines, in its discretion, "that information is required for the purposes of rulemaking or is necessary or helpful in the determination of its policies." *Id.* § 502.282. The Commission may also promulgate rules using notice-and-comment rulemaking, *id.* §§ 502.51-502.56; *see also* 5 U.S.C. § 553, and so-called "negotiated rulemaking," 46 C.F.R. § 502.56 ("The Commission, either upon petition of interested persons or upon its own motion, may establish a negotiated rulemaking committee to negotiate and develop consensus on a proposed rule, if . . . use of such a committee is determined by the Commission to be in the public interest.").

Under the Act, potential violations of the nondiscrimination provision may be brought to the Commission's attention by a private party, 46 U.S.C. app. § 1710(a), or upon its own motion, *id.* §§ 1710(c), 1713(a).[4] In either case, the statute requires that the Commission provide the "opportunity" for some type of hearing. *Id.* § 1713(a).

The Commission has determined, pursuant to its delegated authority, that the initial assessment of any violation should be made by an administrative law judge ("ALJ"). 46 C.F.R. § 502.223. In a hearing before the ALJ, non-lawyers are permitted to represent parties. *Id.* § 502.27 (permitting a

[4] The Act also permits the United States or the complainant to seek an injunction in federal court. 46 U.S.C. app. § 1710(h).

"person who is not an attorney at law" to practice before the Commission if certain criteria are met). The ALJ does not have any independent enforcement power. *See id.* § 502.210(b). After the conclusion of the hearing, the ALJ makes an "initial or recommended decision[]." *Id.* § 502.223.

Any party may seek the Commission's review of the ALJ's decision, or (as here) the Commission may review the decision on its own motion. *See id.* § 502.227. On such review, the Commission may take notice of "technical or scientific facts within the general knowledge of the Commission as an expert body." *Id.* § 502.226(a). Moreover, the Commission has the option of limiting the relevant issues through rulemaking. *See id.* § 502.227(a)(6); *see also id.* §§ 502.51-502.56. Finally, the Commission may decide, through rulemaking or by adjudicatory order in a particular case, to exempt a "class of agreements . . . or [a] specified activity . . . from any requirement of the Shipping Act" if it determines that the exemption "will not result in substantial reduction in competition or be detrimental to commerce." *Id.* § 502.67.

If the Commission finds a violation, it may issue a cease and desist order, order reparations to be paid to the injured party, or assess civil penalties payable to the United States. 46 U.S.C. app. §§ 1710(a), 1712(a), 1713(c). The Commission does not possess independent coercive power to enforce its orders. *See id.* § 1713(c). The Commission's decision constitutes the "final decision[]" of the agency. 46 C.F.R. § 502.225.

If the regulated party does not comply with the order, the statute provides enforcement mechanisms. If the Commission orders reparations to be paid to a private party, the statute provides that "the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction [over] the parties." 46 U.S.C. app. § 1713(d). An injured private party may also seek to enforce a nonreparation order in court. *Id.* § 1713(c).

Alternatively, the statute provides an enforcement mechanism for the United States. Although the Commission itself does not have independent enforcement authority, the Attorney General may file an enforcement action on behalf of the United States in a federal district court. *See id.* ("In case of violation of an order of the Commission, . . . the Attorney General . . . may seek enforcement by a United States district court having jurisdiction over the parties."). The Commission may also induce compliance—both throughout the proceedings and with the final order—by assessing civil penalties for violations of regulations or of a Commission order. *Id.* § 1712(a). The Commission does not have independent authority to enforce these penalty provisions, but, as with the final order, may request that the Attorney General bring an enforcement action. *Id.* § 1712(e). Any civil penalties are payable to the "United States." *Id.* § 1712(a).

If a party disagrees with a Commission order, it has two options. First, it may choose to defend in any enforcement action. *See id.* § 1713(c)-(d). Alternatively, the regulated party may file a petition for review of the agency's action, in the court of appeals, under the Hobbs Act. 28 U.S.C. § 2341 *et seq*. In such an action, "[t]he action shall be against the United States." *Id.* § 2344.

B. The Present Case.

The South Carolina State Ports Authority ("Ports Authority") is a "maritime terminal operator" covered by the Shipping Act of 1984, *see* 46 U.S.C. app. § 1702(14), and is therefore subject to the Act's nondiscrimination provision, *id.* § 1709(d). A private company, South Carolina Maritime Services, Inc. ("Maritime Services"), objected that the Ports Authority had violated the nondiscrimination provision by refusing it berthing space while granting berthing space to another company that Maritime Services believed to be similarly situated. Availing itself of the procedural mechanism to bring the alleged violation to the Commission's attention,

Maritime Services filed an administrative complaint against the Ports Authority. *See id.* § 1710(a).

Following the procedures that the Commission has established by regulation, an ALJ was assigned to hold a hearing and to provide a recommended decision to the Commission. *See* 46 C.F.R. § 502.223. In this hearing, the Ports Authority asserted, *inter alia*, that because it had been deemed an arm of the State under Fourth Circuit precedent, *see Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir. 1995), it was entitled to invoke the sovereign immunity of the State as a complete defense in the Commission's proceedings. The ALJ agreed and, on that basis, dismissed the proceeding. Pet. App. 59a-60a.

Although neither party appealed, the Commission decided to hear the matter on its own motion. *See* 46 C.F.R. § 502.227. The Commission rejected the notion that an administrative proceeding initiated by a private party is similar to a lawsuit and that sovereign immunity should thus apply. Rather, the Commission stated, both "Commission investigations, and private complaint proceedings, are part of a unified system of regulation." Pet. App. 34a. Whether the proceeding is initiated by a private complaint or on the Commission's own motion (including after investigating at the instance of a private party), the Commission held, they are both part of a "unitary . . . regulatory scheme" in which "all . . . determinations as to whether the Act has been violated . . . are made by the Commission." Pet. App. 34a-35a (citation omitted).

The Ports Authority then filed a petition for review in the court of appeals under the Hobbs Act. As required by the Hobbs Act, the United States and the Commission were respondents in the action. *See* 28 U.S.C. § 2344. The initial complaining party, Maritime Services, was not named in the petition and is not a party before this Court.

The Court of Appeals for the Fourth Circuit granted the Ports Authority's petition for review. *South Carolina State Ports Auth. v. FMC*, 243 F.3d 165 (4th Cir. 2001). The court of appeals held that this Court's cases involving the immunity of the states from private lawsuits in federal and state courts apply with equal force to adjudicatory proceedings before an administrative agency. *See id.* at 169.[5] To reach this conclusion, the court of appeals equated an adjudicatory administrative proceeding initiated by a private party before the Commission with a suit in court, stating that, in its view, the proceeding before the Commission "walks, talks, and squawks" like a lawsuit. *Id.* at 174. The Fourth Circuit held that because this case involved an "adjudication," sovereign immunity must apply. *Id.*

ARGUMENT

I. STATES HAVE NO SOVEREIGN IMMUNITY AS AGAINST THE UNITED STATES.

Our government is founded on a system of dual sovereignty. Each government—both state and federal—is sovereign and distinct within its sphere. *See* Federalist No. 39 (Madison) ("[The states] form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere."). The states did not forfeit this sovereignty by ratifying the Constitution,

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5 For example, the Fourth Circuit stated:

> [The Supreme] Court noted [in *Alden*] the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution . . . ." This language, referring to "proceedings or suits," makes it clear that certain proceedings, while not suits, are nevertheless barred by the doctrine of sovereign immunity.

243 F.3d at 170 (internal quotations and citation omitted).

but, rather, retain "a residuary and inviolable sovereignty." *Id.* This Court has held that, as part of this residual sovereignty, states possess sovereign immunity, according them "the respect owed them as members of the federation." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) (sovereign immunity "central to [states'] sovereign dignity").

At the same time, however, the states did surrender a portion of their sovereignty to the national government. This notion is reflected in the Supremacy Clause, and in the very structure of our federal system. U.S. Const. art. VI. The states, for example, relinquished to the federal government the plenary authority to regulate interstate and foreign commerce. As this Court recognized in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824), this power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Indeed, the need for a central government to regulate commerce, without interference from the states or foreign nations, was "one of the reasons for adopting the Constitution." *United States* v. *Locke*, 529 U.S. 89, 99 (2000); *see also* Federalist Nos. 12 (Hamilton), 44 (Madison), 64 (Jay).

The federal power to regulate the activity of the states in maritime commerce is uncontroverted in the present case. As this Court stated in the context of the Shipping Act of 1916: "[I]t is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies." *California v. United States*, 320 U.S. 577, 586 (1944) (citation omitted). Indeed, even where members of this Court have expressed doubt regarding the power of the federal government to regulate the states, no doubt was expressed regarding the federal

government's constitutional authority to regulate navigation. *EEOC v. Wyoming*, 460 U.S. 226, 269 n.5 (1983) (Powell, J., dissenting, joined by O'Connor, J.) ("[I]t is part of the power to regulate interstate navigation that lies within the very core of the Commerce Clause. I certainly do not suggest that principles of federalism should prevent Congress from regulating navigation.").

By granting the federal government plenary authority to regulate in defined areas, the states necessarily relinquished part of their sovereign immunity under the "plan of the [Constitutional] convention." Federalist No. 81 (Hamilton); *see also Alden*, 527 U.S. at 755 ("[C]ertain limits are implicit in the constitutional principle of state sovereign immunity."); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). Most significantly, "[i]n ratifying the Constitution, the States consented to suits brought by . . . the Federal Government," *Alden*, 527 U.S. at 755 (citation omitted), and thus "States have no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. 305, 311 (1987); *see also United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."). For this reason, the Court has consistently recognized that the federal government may bring suit against a state in federal court to obtain compliance with federal law. *See, e.g., Alden*, 527 U.S. at 755-56, 759-60; *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996). Such power, the Court has held, is not only "inherent in the constitutional plan," *Principality of Monaco*, 292 U.S. at 329 (citations omitted), but is also necessary to the "permanence of

the Union," *United States v. Texas*, 143 U.S. 621, 644-45 (1892).[6]

Where the federal government has the power to regulate the activity of the states, it also has the power to enforce its laws against the states—either through direct enforcement or by otherwise inducing compliance with its regulatory scheme. "Any federal regulation demands compliance," even by the states. *South Carolina v. Baker*, 485 U.S. 505, 515 (1988). In *Reno v. Condon*, 528 U.S. 141 (2000), for example, the Court upheld a "regulatory scheme" in which federal law prohibited states from disclosing personal information in department of motor vehicle records. The Court expressly noted that the provisions at issue were enforceable, in part, by a regulatory process under which the United States Attorney General could impose substantial fines on the states for non-compliance. *Id.* at 146-47. The state objected that these penalty provisions had the effect of coercing the state,

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6 Other limits on states' sovereign immunity were "in the plan of the convention." *See* Federalist No. 81 (Hamilton). In ratifying the Constitution, states also consented to suit by other states:

> [A] suit by one State against another State . . . involve[s] a distinct and essential principle of the constitutional plan which provides means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State. . . . [This waiving of sovereign immunity] was essential to the peace of the Union. The Federalist, No. 80; Story on the Constitution § 1679. With respect to such controversies, the States by the adoption of the Constitution, acting in their highest sovereign capacity, in the convention of the people, waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established by their own consent and delegated authority as a necessary feature of the formation of a more perfect Union.

Principality of Monaco, 292 U.S. at 328-29 (internal quotations and citations omitted).

noting that the statute's "penalty provisions hang over the States as a potential punishment should they fail to comply with the Act." *Id.* at 150. The Court observed that such a threat is "an inevitable consequence of regulating a state activity." *Id.* (internal quotations and citation omitted). In short, since "[a]ny federal regulation demands compliance," the federal government may coerce states in order to encourage such compliance. *Id.* (internal quotations and citation omitted).

It is against this background of the power of the federal government to take appropriate enforcement action against the states, in spheres committed to federal authority, that the Court should assess the constitutionality of Commission adjudications of violations of the Shipping Act.

II. AN AGENCY PROCEEDING IS THE PROCESS BY WHICH THE EXECUTIVE DECIDES HOW IT WILL ENFORCE FEDERAL LAW.

The court of appeals held that the reasoning of this Court's precedents involving the immunity of the states from private lawsuits in federal and state courts applies with equal force to adjudicatory proceedings initiated by a private party before an administrative agency. *See* 243 F.3d at 169. To reach this conclusion, the court of appeals equated the adjudicatory administrative proceeding before the Commission with a private suit in court, stating that, in its view, the proceeding before the Commission "walks, talks, and squawks" like a lawsuit. *Id.* at 174. In the court's view, the "placement [of the proceeding] within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication," *id.*, and, for this reason, sovereign immunity applies.

The Fourth Circuit's reasoning, however, fundamentally misconceives the administrative process. The Commission's adjudicatory process is the means by which it gather facts, assesses competing law and policy considerations, and determines what position *it* will take in enforcing federal law.

While that process is informed by a privately initiated proceeding before an administrative law judge, it is fundamentally different from a lawsuit.

Agencies can go about deciding what position to take in the enforcement of the law in various ways: they can engage in notice-and-comment rulemaking, adjudications, negotiated rulemaking, informal agency action, and various permutations of each of these. 5 U.S.C. §§ 553-558; *see generally* 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 225-401 (3d ed. 1994). There are many reasons why an agency might choose one form over another. For example, "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule." *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) ("*Chenery II*"). Moreover, a decision about which means to use entails a political judgment by an agency about how it should allocate its limited resources to address a wide array of issues. *See* 1 Davis & Pierce, *Administrative Law Treatise* 280; *see also id.* at 365 ("It is not uncommon for a single rulemaking to require a decade and commitment of 10 percent of an agency's total staff and resources."); Richard J. Pierce, Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 Hastings L.J. 1 (1979). In each instance, however, the agency is doing the same thing: It is determining what position the national government should take in enforcing the law. *See Chenery II*, 332 U.S. at 200-03.

The Court's *Chevron* jurisprudence also recognizes that rulemakings and adjudications are merely different means by which an agency makes these policy decisions. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court held that courts should defer to an agency's interpretation of a statute, so long

as it is reasonable, because the resolution of such a question involves a policy judgment that Congress left to the agency. *Id.* at 842-43. As the Court stated: "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy . . . to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (internal quotations and citation omitted) (first alteration in original). Although *Chevron* itself involved a notice-and-comment rulemaking, this Court has repeatedly applied *Chevron* deference to policy made through adjudications as well. *E.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 423-25 (1999); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 389-99 (1996); *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 644-45 (1990). This deference to both adjudications and rulemakings is required because each represents the agency's determination of a policy issue delegated to it by Congress. *See also United States v. Mead Corp.*, 533 U.S. 218, ___, 121 S. Ct. 2164, 2171 (2001) ("Delegation of such [policy making] authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking . . . .").

The functional equivalence of rulemaking and adjudication as a means to execute the law is central to administrative law. *See Chenery II*, 332 U.S. at 200-03. Moreover, the Court has steadfastly declined to dictate one method of decisional process (rulemaking) over another (adjudication): "In performing its important functions . . . , an administrative agency must be equipped to act either by general rule or by individual order." *Id.* at 202. To interfere with the agency's process, the Court has held, would "stultify the administrative process," making the process "inflexible and incapable of dealing with many of the specialized problems which arise." *Id.* (citation omitted). The Court reaffirmed this holding in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974) ("[T]he choice between rulemaking and adjudication lies . . . within the [agency's] discretion."). Moreover,

since *Bell Aerospace*, this Court "has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication." 1 Davis & Pierce, *Administrative Law Treatise* 273. As the Court held in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978), courts should not "intrude[] into the agency's decision making process," but should leave the decision making process to the "discretion of the agencies to which Congress has confided the responsibility for substantive judgments." *See also id.* at 545 (dictating additional procedures "'propel[s] the court into the domain which Congress has set aside exclusively for the administrative agency'") (quoting *Chenery II*, 332 U.S. at 196); *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 653-56 (1990) (applying *Vermont Yankee* to adjudications).

When the Commission in this case commenced a proceeding against the Ports Authority on the basis of a complaint by a private party, it was engaged in the sort of adjudicative lawmaking that is central to administrative law. The Commission, as "the expert body established . . . for safeguarding this specialized aspect of the national interest," *California*, 320 U.S. at 584, is responsible for the "final decision" of the agency, 46 C.F.R. § 502.225. To this end, the agency has established a procedure by which a recommended decision is made by an administrative law judge after conducting a hearing. *Id.* § 502.223 ("To the administrative law judges is delegated the authority to make and serve initial or recommended decisions."). In such proceedings, non-lawyers are permitted to appear. *Id.* § 502.27. Although the ALJ makes an initial determination, "[t]he ALJ's decision is no more than a recommendation that the Commission is free to reject." *Petchem, Inc. v. FMC*, 853 F.2d 958, 962 (D.C. Cir. 1988).

After receiving the recommendation of the ALJ, the Commission is then free to reach whatever determination it deems appropriate. *See* 46 C.F.R. § 502.227(a)(6). Because

it is the Commission that makes the final policy judgment for the agency, the Commission may—as in this case—review the decision of an ALJ even when neither party appeals the case. *See id.*[7] Moreover, in making this final decision for the agency, the Commission may take notice of "technical or scientific facts within the general knowledge of the Commission as an expert body." *Id.* § 502.226(a).

Unlike a case before a court, neither the ALJ nor the Commission has independent enforcement power or independent contempt power: the United States must go to court to compel action of any sort. Moreover, a reviewing court can only review the decision "[on] the grounds" provided by the agency, as a contrary rule would "propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Chenery II*, 332 U.S. at 196 (summarizing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) ("*Chenery I*")).[8] In this case, the private party that brought the initial complaint declined to seek review of the ALJ's order of dismissal before the Commission; significantly, it is the Commission that reached out to continue to pursue the proceeding, and it is the Commission that is the petitioner in this Court.

The court of appeals' focus on certain procedural similarities between the agency process and a private lawsuit overlooked the more important functional equivalence of no-

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7 Needless to say, the Commission's ability to decide an issue even when no party has "appealed" contrasts with the role of a federal court. A court can only hear "cases," and therefore does not have the power to act without an aggrieved party. The Commission, by contrast, is setting the policy for the Executive branch and, therefore, has the right—and duty—to act even when no party seeks review.

8 *Chenery I*, of course, stands in contrast to the rule this Court and federal appellate courts apply in reviewing the decisions of lower courts. This Court and the courts of appeals may affirm a decision on alternate grounds. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 166 (1997).

tice-and-comment rulemaking and agency adjudication. The mere fact that an agency proceeds by means of adjudication does not convert the matter from agency action into a lawsuit: "It is no doubt true that [agencies] 'adjudicate,' *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication;'" rather, adjudications by agencies involve "individuals exercising *executive* rather than *judicial* power (in the constitutional sense)." *Freytag v. Commissioner*, 501 U.S. 868, 908-09 (1991) (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in the judgment) (emphasis in original).

Nor does the fact that this case may have required the resolution of factual issues mean that the Commission proceeding must be equated with a private lawsuit. Agencies necessarily resolve factual issues in a broad array of settings in the process of executing the law. Indeed, as this Court has recognized, it may even decide such issues through notice-and-comment rulemakings. In *Heckler v. Campbell*, 461 U.S. 458 (1983), for example, the Social Security Administration developed a "matrix" to decide whether an applicant's particular factual scenario would constitute a "disability" within the meaning of the Social Security Act—a factual assessment that had previously been determined through hearings. *Id.* at 461-62. The Court upheld the agency's approach, concluding that an agency may "rely[] on rulemaking to resolve certain classes of issues," "even where an agency's enabling statute expressly requires it to hold a hearing." *Id.* at 467.

Similarly, the regulatory scheme at issue here permits the Commission to limit the issues decided by engaging in notice-and-comment rulemaking to narrow the range of issues. *See* 46 C.F.R. § 502.227(a)(6); *see also id.* §§ 502.51-502.56. Moreover, pursuant to its delegated authority to administer and enforce the law, the agency may also decide, by "order or rule," to exempt a "class of agreements . . . or [a]

specified activity . . . from any requirement of the Shipping Act," so long as it determines that the exemption "will not result in substantial reduction in competition or be detrimental to commerce." *Id.* § 502.67.

That a Commission proceeding may be initiated by the filing of a complaint by a private party, 46 U.S.C. app. § 1710(a), as well as at the Commission's own initiative, *id.* § 1710(c), does not transform the agency proceeding into the equivalent of a private lawsuit.[9] As Justice Jackson observed for the Court in *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), although there have been times "especially early in the history of the federal administrative tribunal" where "courts were persuaded to engraft judicial limitations upon the administrative process," judicial and administrative powers are distinct concepts. In particular, "an administrative agency charged with seeing that the laws are enforced may . . . have and exercise the powers of original inquiry" and "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Id.* at 642-43. Surely, the Commission's power to investigate—to assure itself that the law is not being violated—extends far enough to permit the Commission to conduct proceedings, not only when it has itself uncovered evidence of a violation of law, but when a private party brings alleged wrongdoing to its attention. This process of "inform[ing] itself as to whether there is [a] probable violation of the law," *id.*, does not alter the fact that the Commission is engaged in law enforcement and not the sort of adjudication of claims that characterizes the judicial system.

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9 It is certainly reasonable for Congress to have concluded that this statutory structure constitutes an appropriate way to bring potential violations of law to the Executive's attention, so the Executive Branch can then decide what action it should take.

Finally, and for similar reasons, an administrative proceeding before the Commission is unlike an adjudication before an Article I court such as the Court of Federal Claims or a bankruptcy court. Unlike the Commission, those entities have not been delegated, and do not exercise, any authority to make policy on behalf of the Executive Branch. *See Chevron*, 467 U.S. at 843-44. Similarly, neither the Court of Federal Claims nor a bankruptcy court can be said to be engaged in the *enforcement*, as opposed to the neutral *application*, of the law. The Commission conducts adjudications to determine what position the United States should take in enforcing the law. In sharp contrast, these Article I courts act as neutral arbiters and possess independent coercive powers, *see* 28 U.S.C. § 2521; Fed. R. Bankr. P. 9020. *See also Freytag*, 501 U.S. at 891 (Tax Court exercises "judicial power" because "[i]t is neither an advocate nor rulemaker. . . . [I]t construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service."). Unlike Commission proceedings, moreover, appeals from the decisions of the Court of Federal Claims and the bankruptcy courts are not, as a matter of course, brought against the United States, and the determinations of these Article I courts are not enforced through actions brought by the Attorney General.

Thus, even though some analogies may be drawn between an administrative proceeding before the Commission and a lawsuit, the two are fundamentally different: an administrative proceeding before the Commission constitutes an action by the federal government to decide the position of the United States in enforcing federal law, while a lawsuit involves the final and enforceable resolution of a discrete case or controversy by a disinterested referee with no independent duty to investigate and enforce the law.

III. A STATE DOES NOT HAVE IMMUNITY IN A COMMISSION PROCEEDING AS ANY COMPULSION RESULTS FROM THE ACTION OF THE UNITED STATES.

This Court has long recognized that sovereign immunity protects the states from the requirement that they defend lawsuits as a result of private compulsion. Here, the Ports Authority's argument fails, not only because a Commission proceeding is not a lawsuit, but also because no private party may compel a marine terminal operator to appear and defend itself before the Commission. As a result, the sort of private compulsion that forms the essential touchstone of sovereign immunity doctrine is not present here.

In a proceeding before the Commission, whether initiated by a private party or the Commission, the Commission lacks independent enforcement power. As the court of appeals observed, "under the Act, a state may choose to ignore a subpoena, an order, or a judgment." 243 F.3d at 175. Rather, the direct, coercive force of the law is not implicated until either the Attorney General, in his discretion, brings an action to enforce the Commission's order or a private party brings an action seeking to enforce an order in federal district court. *See* 46 U.S.C. app. § 1713(c)-(d). There is no question, however, that the United States may maintain a suit against a state instrumentality, and that the "States have no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. at 311. A claim brought by a private party to enforce a reparation or other order, in contrast, would likely be met with the state's assertion of a sovereign immunity defense. To the extent such a defense has merit, the state could readily avoid suit, and would suffer no coercion at the hand of a private party.

Finally, it is possible that a state instrumentality might, at the administrative stage, feel the indirect pressure of the threat of a later enforcement action that the Attorney General might bring. Any such coercion, however, is the product of a

constitutional structure that permits the United States to enforce neutral regulations against state instrumentalities, and that permits the United States to bring suit against state instrumentalities to obtain compliance. In short, any such coercion is the product of federal action—or the threat of federal action—and not the sort of private action that implicates sovereign immunity.

A. Sovereign Immunity Protects a State From Coercion by a Private Party.

In Federalist No. 81, in a passage repeatedly quoted by this Court, *see, e.g.*, *Alden*, 527 U.S. at 716-17, Alexander Hamilton laid out the general principle that states are immune from suits by private parties: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." Federalist No. 81 (Hamilton) (emphasis omitted). Hamilton continued, giving further content to this general statement, and linked sovereign immunity to a state's protection from compulsion by a private party:

> The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?

Id.[10]

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[10] Some of the statements of the Founders could be construed (as the court of appeals seems to have concluded) to support the thesis that sovereign immunity protects states not only from coercion by a private party, but also from the mere fact of being *asked* to appear. At the Virginia

Similarly, in his dissenting opinion in *Chisholm v. Georgia*, Justice Iredell tied sovereign immunity to protection of a sovereign against compulsion by an individual: "my present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." 2 U.S. (2 Dall.) at 449-50. Justice Iredell went on to note that the citizen's recourse is to the conscience of the sovereign: "The remedy, in the language of Blackstone, being a matter of grace, and not on compulsion." *Id.* at 444; *see also id.* at 442 ("'If any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his Chancellor will administer right, as a matter of grace, though not upon compulsion.'") (quoting Blackstone). Translating this from the context of the King to that of the states, Justice Iredell stated: "public faith alone is the ground of relief, and the Legislative body the only one that can afford a remedy, which from the very nature of it must be the effect of its discretion and not of any compulsory process." *Id.* at 446.

Since Justice Iredell's famous dissent, this Court has repeatedly tied sovereign immunity to protecting the states

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ratifying convention, for example, John Marshall stated: "I hope that no gentleman will think that a state will be called at the bar of the federal court." 3 *Debates on the Federal Constitution* 555 (Jonathan Elliot 2d ed. 1836). Nonetheless, two sentences later, Marshall explicitly linked the indignity to coercion: "It is not rational to suppose that the sovereign power should be *dragged* before a court." *Id.* (emphasis added). Other statements by the Founders are best seen as conclusory statements that states are immune from private suits. *See, e.g., id.* at 533 (Madison) ("It is not in the power of individuals to call any state into court . . . . [I]f a state should condescend to be a party, this court may take cognizance of it."). The Founders' concern about coercion is not surprising, in light of the hefty war debt of many of the states, and the concern of many of the Founders that states not be compelled to pay these debts. *See, e.g.*, Federalist No. 81 (Hamilton); *see also Alden*, 527 U.S. at 716; *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

from coercion by a private party (or foreign state or Indian tribe). *See, e.g., Alden*, 527 U.S. at 717 ("'The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.'") (quoting Federalist No. 81); *Seminole Tribe*, 517 U.S. at 75 (refusing to subject state official "to the full remedial powers of a federal court, including, presumably, contempt sanctions" in a private suit); *In re Ayers*, 123 U.S. 443, 505 (1887) (private suits against states present "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties"); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (a state "cannot be compelled by suit [by an individual] to perform its contracts"). Where there is no such coercion, a state's sovereign immunity is not implicated.

B. Private Parties and the Commission Do Not Have Independent Coercive Powers and Any Coercion in the Regulatory Scheme Is the Power of the United States.

Under this principle, the court of appeals erred in directing that the Commission dismiss the administrative proceeding brought against respondent. Neither the private party nor the Commission has any independent coercive power in the proceeding. As a result, any coercive effect on the Ports Authority must be the product of (1) the risk of stigma the Ports Authority may experience by failing to comply with federal administrative rules and orders; (2) the possibility that a private party might bring an action to enforce an order of reparation or other order entered by the Commission; or (3) the possibility that the Attorney General might someday bring an enforcement action. None of these potential sources of coercion, however, supports the court of appeals' decision.

1. Stigmatic Harm

In an administrative proceeding initiated by a private party, the state cannot be "compelled" by the party or the

Commission to do anything. As the court of appeals recognized: "[U]nder the Act, a state may choose to ignore a subpoena, an order, or a judgment." 243 F.3d at 175 (citation omitted).

The court of appeals recognized the lack of enforcement power, but noted that the state would suffer an unacceptable "stigma" if it chose not to answer to the administrative proceedings: "[A] judgment or a subpoena against a state is a powerful thing, if not legally, then certainly *politically*. All parties, and certainly political entities such as states, have an interest in avoiding the *stigma* that attaches even to an unenforceable default judgment." *Id.* (emphasis added). Yet the possible "stigma" that the Fourth Circuit objects to is nothing more than the political accountability that principles of federalism require that a state bear. *See Alden*, 527 U.S. at 775-52; *Hans*, 134 U.S. at 21 ("The legislative department of a state represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule . . . never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself."); *Chisholm*, 2 U.S. (2 Dall.) at 446 (Iredell, J., dissenting) (if a state legislature fails to provide a remedy for its citizens, it must incur "whatever reproach" its citizens deem appropriate); *cf. New York v. United States*, 505 U.S. 144, 168 (1992). Thus, the court of appeals got it backwards: the state might ignore the administrative proceeding, but must be willing to accept "whatever reproach the [state] may incur." *Chisholm*, 2 U.S. (2 Dall.) at 446 (Iredell, J., dissenting).

2. *Enforcement Action by Private Party*

Similarly, the possibility that a private party might someday bring an action in federal district court seeking to enforce a reparation or other order against a state instrumentality, *see* 46 U.S.C. app. § 1713(c)-(d), does not support the court of appeals' decision. In such an action, it is likely that

a state would assert sovereign immunity. To the extent that a court treats a privately initiated action to enforce a reparation or other order as a private suit against the state, it is likely that the court would sustain the defense.[11] In this instance, the state instrumentality could not and would not be coerced: it would be free to participate in the district court litigation and to accept any judgment the court might enter, or it would be free to assert its immunity and to leave the private plaintiff without a judicial remedy.

But the fact that a state instrumentality might assert sovereign immunity as a defense to an action to enforce a reparation order does not deprive the Commission of the authority to determine whether reparations are due. As the Commission stated in this case:

> [E]ven if a court were to rule that a Commission reparations award is unenforceable, the issuance of an order finding violations of the Shipping Act is not futile. The Commission must be able to determine whether the actions of regulated entities like [the Ports Authority] violate the Shipping Act. Whether or not a complainant is able to collect on a reparations award is a separate issue, distinct from the Commission's obligation to pass judgment on the legality of allegedly unreasonable or otherwise prohibited actions.

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[11] The Court need not, and should not, decide here whether sovereign immunity is available as a defense in a private enforcement proceeding. *Compare* Pet. App. 35a-37a (Commission argues that a state would not have sovereign immunity in such an action) *with* Brief for the United States in Opposition at 9 n.2 (Solicitor General takes position that states would have immunity in a private enforcement proceeding). If, as the Solicitor General asserts, states have sovereign immunity in such a proceeding, the states would not suffer any coercion as they could assert this immunity; if the Commission is correct, any coercion present would be constitutionally permissible.

Pet. App. 37a.[12] Moreover, sovereign immunity is a discretionary defense, which a state may assert or may forgo. Rather than face public "reproach," the state might well elect to defend its actions either before the court of appeals, under the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, or before the district court in an enforcement action, 46 U.S.C. app. § 1713(c)-(d).

3. Enforcement Action by the United States

If private enforcement were all that was at stake, and if a state were entitled to assert sovereign immunity in such an action, a state might default in the Commission proceeding with little concern: the state could avoid any enforceable judgment and would merely need to assess the political cost of non-compliance. Under the statutory scheme, however, the United States has a duty to enforce the law, including by going to federal district court to seek an enforceable judgment in appropriate cases. The Act specifies that the United States, through the Attorney General, "may seek enforcement [of a nonreparation order] by a United States district court having jurisdiction over the parties." 46 U.S.C. app.

12 Furthermore, a Commission order determining that a state has violated the law—even if that order is unenforceable—is important to ensure that a state is accountable to its citizens. This Court has repeatedly noted that a state must be politically accountable to its citizens for any failure to comply with federal law, and that such accountability is critical to the workings of federalism. *Alden*, 527 U.S. at 775-52; *Hans*, 134 U.S. at 21; *Chisholm*, 2 U.S. (2 Dall.) at 448 (Iredell, J., dissenting); *cf. New York*, 505 U.S. at 168. In the context of administrative law, however, the substantive requirements of law are not always based on preexisting norms, but at times depend on the administrative agency choosing one policy from the range of permissible policy choices. *See Chevron*, 467 U.S. at 842-43. In other words, the substantive requirements of law are often not decided until the completion of the administrative process—i.e., until after the Executive has decided and articulated its policy through its agency. Thus, the administrative order is necessary to permit citizens to hold a state politically accountable for any decision to fail to comply with federal law and, therefore, is necessary to the workings of federalism. *See Alden*, 527 U.S. at 775-52; *New York*, 505 U.S. at 168.

§ 1713(c). Similarly, the Attorney General may seek enforcement of an order assessing civil penalties "in an appropriate district court of the United States." *Id.* § 1712(e). But such action by the United States does not give rise to sovereign immunity concerns; it is well settled that states do not have sovereign immunity as to suits by the federal government. *Compare Alden*, 527 U.S. at 755-56, 759-60 and *Seminole Tribe*, 517 U.S. at 71 n.14 *with West Virginia v. United States*, 479 U.S. at 311 and *United States v. Texas*, 143 U.S. at 645; *see also FMC v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975) (stating, in the context of a proceeding involving a state instrumentality, "[i]t is beyond cavil that the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate the activities of the entities over which it has jurisdiction and the right under the appropriate conditions to have district courts enforce its [actions]").

It is true that states may feel some pressure—or effective coercion—to participate in the administrative process based on the *threat* that the United States may someday bring an enforcement action. Such indirect coercion, however, is entirely consistent with the federal structure and the constitutional allocation of state and federal power. Any such coercion is intimately intertwined with the United States's "right to govern." *Hall*, 440 U.S. at 416.

Where the federal government has the power to regulate the states, it also has the power to enforce its laws against the states—either through direct enforcement or by inducing compliance with its regulatory scheme. Even in those areas in which members of the Court have expressed doubts about the federal government's power to regulate states, *see, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557-79 (1985) (Powell, J., dissenting); *EEOC v. Wyoming*, 460 U.S. at 265-75 (Powell, J., dissenting), no Justice has ever suggested that the United States is limited in taking en-

forcement action where the substantive power exists. Thus, although members of the Court doubted whether the federal government could regulate age discrimination involving state employees, *EEOC v. Wyoming*, 460 U.S. at 265-75 (Powell, J., dissenting), or the wages paid to those employees, *Garcia*, 469 U.S. at 557-79 (Powell, J., dissenting), it has never been suggested that, once that power was found, the United States could be denied the ability to enforce the law. *See Alden*, 527 U.S. at 759 (suggesting that any federal interest could have been protected by sending an attorney for the United States to Maine to enforce wage-and-hour laws). If the federal government has the power to regulate the activity of the states—as it does here—it necessarily has the power to induce compliance. The power to regulate, without the power to induce compliance, is no power at all.

Just two Terms ago, this Court upheld, over constitutional challenge, a federal law that regulated the states and induced compliance through a federal administrative mechanism. In *Reno v. Condon*, the state objected that the penalty provisions of the scheme coerced it to comply, noting that the statute's "penalty provisions hang over the States as a potential punishment should they fail to comply with the Act." 528 U.S. at 150. The Court rejected this challenge on the ground that any such coercion is "an inevitable consequence of regulating a state activity." *Id.* (internal quotations and citation omitted). As the Court noted: "Any federal regulation demands compliance," and this pressure assures compliance. *Id.* (internal quotations and citation omitted).

In sum, whether the federal power is understood as applying at the hearing stage or at the enforcement stage, it is the federal government that is acting, and thus the federal government's "right to govern" that is at stake. *Hall*, 440 U.S. at 416. Accordingly, sovereign immunity does not apply in these proceedings. *See West Virginia v. United States*, 479 U.S. at 311; *United States v. Texas*, 143 U.S. at 645.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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